United Enviro Systems, Inc. and Bradley Garie, William Rathgeb, and Gregory Von Ohlen. Case 22–CA–16290

September 15, 1994

SUPPLEMENTAL DECISION AND ORDER REMANDING

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On February 27, 1991, the National Labor Relations Board issued a Decision and Order in this proceeding¹ in which it ordered the Respondent, inter alia, to make three discriminatees whole for any loss of earnings they suffered by reason of the Respondent's discrimination against them. On February 14, 1992, the United States Court of Appeals for the Third Circuit entered a judgment enforcing the Board's Order.² A controversy having arisen over the amount of backpay due the discriminatees under the Board's Order, the Acting Regional Director for Region 22 issued a compliance specification and notice of hearing on August 25, 1993, alleging the amounts of backpay due and notifying the Respondent that it must file a timely answer complying with the Board's Rules and Regulations. The Acting Regional Director issued an Erratum on August 26, 1993, and extended the time for filing an answer. After requesting and receiving a further extension of time, the Respondent filed an answer to the compliance specification.

After reviewing the Respondent's answer and finding that it did not comply with Section 102.56 of the Board's Rules and Regulations, the Regional Office sent the Respondent a letter, dated November 22, 1993, advising the Respondent that its answer was deficient and that the Region would file a Motion for Partial Summary Judgment if a proper answer was not filed. The Regional Office sent the Respondent another letter the following day which included a copy of the Board's relevant rules and regulations regarding the filing of a proper answer to a compliance specification. Despite requesting and receiving an extension of time in which to file a proper answer, the Respondent did not file an amended answer by the extended filing deadline, December 16, 1993.

On January 18, 1994, the Acting General Counsel filed with the Board a Motion for Partial Summary Judgment, with exhibits attached. The Acting General Counsel's motion contended that, with the exception of paragraphs 5, 8(b), and 9 of the compliance specification,³ the Respondent's answer is not in compliance

with Section 102.56(b) and (c) of the Board's Rules and Regulations. The Acting General Counsel moved that the Board deem those portions not properly denied to be admitted as true, grant its request for partial summary judgment as to the admitted allegations, and limit the hearing to the allegations in paragraphs 5, 8(b), and 9 of the compliance specification.

On January 27, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the Acting General Counsel's motion should not be granted. Thereafter, the Respondent separately filed an amended answer to the compliance specification and a "Memorandum in Opposition to the [Acting] General Counsel's Motion for Summary Judgment." On May 3, 1994, the General Counsel filed a response to the Respondent's memorandum.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on Motion for Partial Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations states:

(b) Contents of answer to specification.—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within

^{1 301} NLRB 942.

² No. 91–3427.

³ Par. 5 relates to the discriminatees' net interim earnings; par. 8(b) relates to the additional sums discriminatee Von Ohlen had to pay in order to secure medical insurance while working for interim employers, and par. 9 relates to the amount that "the vested percentage

in Respondent's pension and profit sharing plan for [discriminatees] Garie and Von Ohlen would have increased due to their additional years of service."

⁴The Respondent generally argues in its memorandum in opposition that the amended answer it filed raises sufficient factual issues regarding the allegations in the compliance specification to warrant a hearing.

⁵The General Counsel contends that the Motion for Partial Summary Judgment should be granted because the Respondent was informed that its original answer was deficient and subsequently failed to file a timely amended answer. The General Counsel argues that, although the Board in *Vibra-Screw, Inc.*, 308 NLRB 151 (1992), and *Aquatech, Inc.*, 306 NLRB 975 (1992), permitted respondents to amend their answers after the Notice to Show Cause issued, those cases involved special factual circumstances that provided a basis for allowing the respondent to amend its answer after the filing of the General Counsel's Motion for Summary Judgment. The General Counsel argues that allowing the Respondent to file amendments to answers after the filing of summary judgment motions not only renders the Board's Rules and Regulations meaningless but also promotes needless delay in remedying unfair labor practices that the Board has found.

Should the Board accept the Respondent's amended answer, the General Counsel still seeks summary judgment with respect to pars. 1–4, 6–7, and 9–10 of the specification.

the knowledge of the respondent, including, but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

The Respondent's original answer to certain paragraphs in the compliance specification constituted a general denial which, as stated, is insufficient under the Board's Rules and Regulations. Based on this original answer, the General Counsel filed his Motion for Partial Summary Judgment. The Respondent subsequently filed an amended answer to the compliance specification. In Bentley's Lounge, 265 NLRB 632 (1982), the Board, while quoting from Standard Materials, 252 NLRB 679 (1980), stated at 632, that "even in the absence of an amended backpay specification, a respondent may amend its answer prior to the hearing in the matter." More recently, the Board reaffirmed that holding in Vibra-Screw, and Aquatech, supra at footnote 5. Thus, because the Respondent timely filed its original answer and filed its amended answer before any hearing was held, we find that the amended answer was timely filed and will consider it on the merits.

As noted, supra, the General Counsel asserts, inter alia, in his response to the Respondent's opposition that, even construing the amended answer as timely filed, the Motion for Partial Summary Judgment should be granted on those paragraphs of the compliance specification set forth in his supporting memorandum. Further, based on the contents of the Respondent's

amended answer, the General Counsel is extending his motion also to include paragraph 9 of the compliance specification. As discussed below, it also appears that the General Counsel now concedes that, if the Board accepts the Respondent's amended answer, then a hearing is required on all of the allegations in paragraph 8 of the compliance specification.

We agree with the General Counsel that the Respondent's amended answer is not sufficient to raise any litigable issue regarding paragraphs 1 through 4. Paragraph 1 states that the backpay period for each discriminatee begins on March 23, 1989, the date that the Respondent discharged the employees, and ends on August 21, 1992, the date that the Respondent made an unconditional offer of reinstatement. Paragraphs 2 through 4 set forth the formula for calculating the discriminatees' gross backpay.

Regarding the backpay period, the Respondent contends that there is an "issue" whether the discriminatees would have been terminated for a lawful reason. The Respondent argues that the discriminatees did not meet their sales quotas before they were terminated. It appears that the Respondent is attempting to relitigate matters that were decided in the underlying unfair labor practice case and the Board repeatedly has held that respondents are precluded from doing this in compliance proceedings.6 Although the Respondent further asserts that the Board should terminate the backpay period on the date that a subsequent employer discharged the discriminatees, the Respondent fails to allege that any of the discriminatees were discharged by any interim employer during the backpay period. We also reject the Respondent's contention that those unemployment benefits the discriminatees received should be deducted from their net backpay because "unemployment insurance benefits are not interim earnings and are not normally offset against backpay liability."7

Regarding the backpay formula, the Respondent objects to the premises of the formula that the General Counsel used. The Respondent asserts that the appropriate measure of backpay is the actual sales performance of the discriminatees while employed by the Respondent, rather than the allegedly higher volume sales performance of employees who were subsequently hired and who worked during the backpay period. However, the Respondent, in objecting to the General Counsel's backpay formula, fails to provide details as to the application of any alternative method of backpay calculation and fails to furnish any appropriate supporting figures based on its contentions. The Board has held that its Rules and Regulations require respondents to do more than simply criticize the bases for the backpay specification. The Respondents must affirmatively

 $^{^6\,\}mathrm{See},\,\mathrm{e.g.},\,\mathrm{\it Hiysota}\,\,\mathrm{\it Fuel}\,\,\mathrm{\it Co.},\,287\,\,\mathrm{NLRB}\,\,1,\,3$ (1987).

⁷ Continental Insurance Co., 289 NLRB 579, 601 (1988).

provide an alternative formula and supporting figures.⁸ Accordingly, we shall grant the General Counsel's motion regarding paragraphs 1 through 4.

Additionally, the Respondents have generally denied paragraphs 5 and 7 of the backpay specification. Because paragraph 5 relates to the discriminatees' interim earnings and because the Board has held that a general denial is sufficient to place interim earnings into issue, 9 the General Counsel does not move for summary judgment on this paragraph. Paragraph 7 of the specification involves the calculation of the discriminatees' quarterly net backpay, which also reflects the amount of their interim earnings as an offset to gross backpay. While we agree with the General Counsel that net backpay should be calculated on a quarterly basis, we find that the Respondent's general denial with respect to paragraph 7 is sufficient to require a hearing on net quarterly backpay as well.

The General Counsel also seeks summary judgment on paragraph 6 of the specification which alleges that discriminatee Gregory Von Ohlen incurred commuting expenses while working for a new employer during the backpay period. In its amended answer, the Respondent contends that Von Ohlen suffered no increase in commuting expenses because he "was required to commute to respondent in any event, and only obtained nearby lodging to be closer to [R]espondent, which reduced his living expenses, while maintaining his residence in River Edge, New Jersey." Based on the Respondent's amended answer, we find that a hearing is required on the issue of whether Von Ohlen's interim earnings should be offset by any commuting expenses he incurred during the backpay period.

Notwithstanding some ambiguity in the General Counsel's response to the Respondent's memorandum in opposition, it appears that the General Counsel is conceding that the Respondent is entitled to a hearing on all of the allegations in paragraph 8. Thus, the General Counsel states that "[n]evertheless, should the Board construe Respondent's Memorandum as a timely filed amendment to its Answer, then sufficient factual

issues exist to preclude summary judgment concerning paragraph 8." [Footnote omitted.] We agree that the Respondent's amended answer is sufficient to require the General Counsel to prove all matters with respect to paragraph 8.

In paragraph 9, the General Counsel avers that during the backpay period the discriminatees' vested percentage in the Respondent's profit plan would have increased if they had remained in the Respondent's employment. The Respondent denies the allegation on the ground that it ceased its pension and profit sharing plans before the discriminatees were discharged. We find that the Respondent's amended answer is also sufficient to require a hearing on this allegation.

Finally, the General Counsel moves for summary judgment on paragraph 10 of the backpay specification, which consists of the total backpay and pension/profit sharing owed to the discriminatees. Because these figures encompass in part those issues on which we are directing a hearing, we also deny summary judgment with respect to the allegations in paragraph 10.

ORDER

It is ordered that the General Counsel's Motion to the Board for Partial Summary Judgment is granted only with respect to the allegations in paragraphs 1 through 4 of the compliance specification. The General Counsel's motion is denied in all other respects.

It is further ordered that this proceeding is remanded to the Regional Director for Region 22 for the purposes of issuing a notice of hearing and scheduling the hearing before an administrative law judge, which shall be limited to taking evidence concerning paragraphs 5 through 10 of the compliance specification.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.56 of the Board's Rules shall be applicable.

⁸ See, e.g., *Heck's*, 282 NLRB 263, 264 (1986).

⁹ See, e.g., *Dews Construction Corp.*, 246 NLRB 945, 947 (1979).